TONY WEST
Assistant Attorney General
Civil Division

C. SALVATORE D'ALESSIO, JR.
Acting Director, Torts Branch
Civil Division

ANDREA W. McCARTHY
Senior Trial Counsel
Civil Division

JAMES G. BARTOLOTTO
KELLY HEIDRICH
Trial Attorneys
Civil Division
United States Department of Justice
P.O. Box 7146
Washington, DC 20044
james.bartolotto@usdoj.gov
Tel: 202-616-4174
Fax: 202-616-4314

Attorneys for the Federal Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

JESSE DUPRIS and JEREMY REED, Plaintiffs, v. SELANHONGVA McDONALD, *et al.*, Defendants.	No. CV-08-08132-PCT-PGR No. CV-08-08133-PCT-PGR (Consolidated)

THE FEDERAL DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT WITH INCORPORATED MEMORANDUM IN SUPPORT

The Federal Defendants respectfully submit this Response to Plaintiffs' Motion for Partial Summary Judgment Re: Federal Employee Status of Tribal Officer Defendants. Doc. 170. Plaintiffs' motion requests the Court hold that tribal officers Joshua Anderson and Perphelia Massey were federal officers as a matter of law for purposes of both the Federal Tort Claims Act (FTCA) and Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). Doc. 170, p. 10. Plaintiffs' motion should be denied as moot because the Federal Defendants do not contest the federal employment status of Anderson and Massey for FTCA purposes.[1] See, e.g., Feldman v. Bomar, 518 F.3d 637, 642 (9th Cir. 2008) ("The basic question in determining mootness is whether there is a present controversy as to which effective relief can be granted.") (quoting Northwest Envtl. Def. Ctr. v. Gordon, 849 F.2d 1241, 1244 (9th Cir. 1988)); Williams v. Alioto, 549 F.2d 136, 140 (9th Cir. 1977) (duty of federal court is to decide actual controversies, not give opinions on moot questions or rules of law which cannot affect the matter before it) (citation omitted); see also Powell v. McCormick, 395 U.S. 486, 496 (1969) ("a case is moot when the issues presented are no longer 'live'"). In the alternative, Plaintiffs' motion should be denied and the FTCA claims dismissed because the actions by the Defendants do not meet the requirements of the proviso to the intentional tort exception of the FTCA. 28 U.S.C. § 2680(h). This Response is supported by the following Memorandum and the Federal Defendants' Controverting Statement of Material Facts (CSOF), filed concurrently.

INTRODUCTION

Plaintiffs sue Anderson and Massey along with four Bureau of Indian Affairs (BIA) agents in their individual capacities (collectively "Individual Defendants") for violations of their Fourth and Fifth Amendment rights under Bivens, and the United States under the FTCA, 28 U.S.C. §§ 1346(b)(1) and 2671, *et seq.*, for intentional torts,

[1] Although the Federal Defendants contest, as they always have, that Anderson and Massey are federal law enforcement officers for purposes of the intentional tort proviso as explained below.

including false arrest and malicious prosecution. Fourth Am. Compl. (FAC) (Doc. 126) ¶¶ 144, 157, 175, 188.

Discovery in this matter closed July 29, 2011, and dispositive motions were due by August 26, 2011. Doc. 144. On August 26, 2011, the United States filed a Motion for Summary Judgment to dismiss Plaintiffs' FTCA claims (Doc. 168) and the BIA Individual Defendants filed a Motion for Summary Judgment to dismiss the Plaintiffs' Bivens claims against them (Doc. 169). The Federal Defendants' Statement of Material Facts supports both of those motions. Doc. 167. On that same day Plaintiffs filed their Motion for Partial Summary Judgment. Doc. 170.

ARGUMENT

ALTHOUGH ANDERSON AND MASSEY ARE FEDERAL EMPLOYEES FOR FTCA PURPOSES, THEY ARE NOT FEDERAL LAW ENFORCEMENT OFFICERS FOR PURPOSES OF THE PROVISO TO THE FTCA'S INTENTIONAL TORT EXCEPTION.

A. Anderson and Massey are federal employees.

Plaintiffs seek a ruling from the Court on an issue that is neither contested, nor relevant to their claims. They request the Court to consider that Anderson and Massey were "federal employees" and/or "federal agents." Doc. 170, pp. 1, 4. Plaintiffs, however, do not explain *why* this is important or necessary to their claims. Moreover, it is a moot point because the Federal Defendants do not contest–and have never contested–that Anderson and Massey were federal employees for FTCA purposes.[2] In fact, the Federal Defendants admitted as much in the United States' two Motions to Dismiss:

---

[2] The Federal Defendants have never taken a position whether, according to Plaintiffs, Anderson and Massey were federal employees "for Bivens purposes." As this Court knows, the U.S. Department of Justice does not represent Anderson and Massey in their individual capacity on the Bivens claims in this matter. However, in an effort to demonstrate the different standards at issue, the test for whether Anderson and Massey may be sued in their individual capacity for alleged constitutional violations under Bivens focuses on whether they were acting not only within the scope of their federal employment but pursuant to federal law and under the color of federal law. See, e.g., Bivens, 403 U.S. at 389; Pollard v. Geo Group, Inc., 607 F.3d 583, 588-90 (9th Cir. 2010).

> Because the tribal officers were carrying out a contract under the Indian Self-Determination Act, they are deemed to be federal employees for FTCA purposes by operation of law. See 25 U.S.C. § 450f (note); Walker v. Chugachmiut, 46 Fed. App'x 421, 423 (9th Cir. 2002).

Doc. 18, p. 7; Doc. 51, p. 6.

The Motions to Dismiss did not challenge the federal employment of Anderson and Massey. Rather, what the United States did argue in those motions, was that Plaintiffs' FTCA claims were barred by, *inter alia*, the intentional tort exception to the FTCA, 28 U.S.C. § 2680(h), because even though Anderson and Massey were federal employees, they were not *federal law enforcement officers empowered to enforce federal law*, which is a requirement under the proviso to the FTCA's intentional tort exception. Doc. 18, pp. 6-10; Doc. 51, pp. 5-10. The United States argued that Plaintiffs' FTCA claims are barred because the tribal police officers were not empowered to enforce federal law and were in fact enforcing tribal law at the time of the arrests. Id. Meeting the requirements of the proviso makes all the difference whether the United States may be sued for the intentional torts of its federal employees. Simply put, it is a distinction with a very real and potentially significant difference in this case.

Plaintiffs miss the point entirely and make no such distinction between the two, stopping short by providing facts only as to Anderson and Massey's federal employment. As a result, Plaintiffs fail to provide any evidence that Anderson and Massey were federal law enforcement officers even if they were federal employees or federal agents. Moreover, Plaintiffs have not requested the Court to find that Anderson and Massey were federal law enforcement officers to satisfy the proviso to the intentional tort exception. Plaintiffs do not argue Anderson and Massey meet the proviso's requirements. The law enforcement distinction, rather than their employment status, is vital to the proviso argument and Plaintiffs fail to even mention it in passing.

Therefore, if Plaintiffs merely desire to have Anderson and Massey considered federal employees or agents for FTCA purposes–the sole relief requested in their motion–then the analysis can stop here; they are federal employees for FTCA purposes.

But, if after reading this opposition brief Plaintiffs somehow now desire their motion to be construed as a request for the Court to deem Anderson and Massey to be federal law enforcement officers for purposes of the proviso, then Plaintiffs are out of luck for the reasons below, not least of which is the simple but important fact Plaintiffs failed to request such relief from the Court. As stated, the crux of the matter, which eludes Plaintiffs, is that just because Anderson and Massey are federal employees for purposes of the FTCA *does not mean* they are automatically law enforcement officers for purposes of the proviso. Locke v. United States, 215 F. Supp. 2d 1033, 1038 (D. S.D. 2002); see also Billings v. United States, 57 F.3d 797, 800 (9th Cir. 1995).

B. Anderson and Massey are not federal law enforcement officers.

As argued in previous motions in this matter, the FTCA waives sovereign immunity and permits *respondeat superior* tort claims against the United States arising out of negligent or wrongful conduct by federal employees acting within the scope of their employment. 28 U.S.C. § 1346(b). As a sovereign entity the United States "'is immune from suit save as it consents to be sued...and the terms of its consent to be sued in any court define that court's jurisdiction to entertain that suit.'" Lehman v. Nakshian, 453 U.S. 156, 160 (1981) (citation omitted). Thus, suit against the United States can only be entertained when Congress has specifically waived the United States' immunity. Id. Such a waiver of sovereign immunity cannot be implied; it must be unequivocally expressed. Franconia Assocs. v. United States, 536 U.S. 129, 141 (2002). The FTCA provides a specific waiver of sovereign immunity for "the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. § 1346(b). The waiver of sovereign immunity is not, however, without limits.

While Congress intended to waive governmental immunity for ordinary common law torts, it expressly retained immunity for claims based on intentional torts such as false arrest and malicious prosecution. 28 U.S.C. § 2680(h). There is a proviso to the intentional tort exception which waives sovereign immunity for these intentional torts if com-

mitted by "investigative or law enforcement" officers of the United States, "who [are] *empowered by law*...to make arrests for violations of *Federal* law." Id. (emphasis added); Arnsberg v. United States, 757 F.2d 971, 977 (9th Cir. 1984), cert. denied, 475 U.S. 1010 (1986) (placing the burden on the plaintiff to satisfy the statutory prerequisite to intentional tort liability). As this Court has stated "the Arnsberg decision makes clear, the United States may be liable under section 2680(h) only if its investigative or law enforcement officers committed the...false arrest." Kerns v. United States, 2007 WL 552227, at *17 (D. Ariz. Feb. 21, 2007) (emphasis omitted), rev'd on other grounds, 2009 WL 226207 (9th Cir. Jan. 28, 2009), cert. denied, 130 S. Ct. 1686 (U.S. Mar. 1, 2010) (No. 09-305). As demonstrated below, that is not the case because Plaintiffs' arrests were neither federal, nor committed by federal investigators or law enforcement officers.

There is no dispute that at all relevant times the BIA agents of the Task Force were federal employees acting within the scope of their employment. CSOF ¶¶ 8, 15, 19. Likewise, due to an exception to the general rule that "the federal government is not liable for torts committed by its contractors," U.S. ex rel. Ali v. Daniel, Mann, Johnson, 355 F.3d 1140, 1146 (9th Cir. 2004), tribal officers Anderson and Massey are deemed to be federal employees for FTCA purposes by operation of law and were acting within the scope of their employment. See 25 U.S.C. § 450f (note); Walker, 46 Fed. App'x at 423; see also Billings, 57 F.3d at 800 (federal law controls when determining who is a federal employee for FTCA purposes). Accordingly, every member of the Task Force was a federal employee acting within the scope of their employment for FTCA purposes. But as demonstrated herein not every member was a federal law enforcement officer to satisfy the proviso. *That* is the tipping point against Plaintiffs' FTCA claims.

First, Anderson and Massey are tribal police officers, CSOF ¶¶ 3, 9, 16, Plaintiffs were arrested on the Reservation, id. ¶¶ 24, 26, by Anderson and Massey, id. ¶¶ 23-24, 26, on tribal charges, id. ¶¶ 22-23, 25, 27, held in tribal jail, id. ¶¶ 28, 32-34, prosecuted in tribal court by the tribal prosecutor, id. ¶¶ 18, 29, and no federal charges issued. Id. ¶¶ 12, 17, 27, 29-31. In fact, one of the main reasons Anderson and Massey were part of

the Task Force was to make an arrest under tribal charges should that need arise because the BIA agents were not authorized to arrest anyone on tribal charges under the Code of Federal Regulations. Id. ¶¶ 8-10, 19-21. Even though Anderson and Massey were instructed by the BIA agents to make the arrests, id. ¶¶ 14, 22-23, that does not change the fact that the arrests were based on tribal law for tribal offenses, subject to tribal penalties if convicted, id. ¶¶ 18, 22-38; not on federal law for federal offenses with federal sentencing guidelines. The undisputed facts unequivocally establish that Plaintiffs were arrested, charged and prosecuted under tribal law. This should be obvious to Plaintiffs who have themselves repeatedly stated that the federal prosecutor declined arrest and prosecution. See, e.g., FAC ¶¶ 63-64, 87-88; CSOF ¶¶ 12-13, 17. Accordingly, federal law was not being enforced and federal interests were not represented. This Court has agreed with that conclusion. Russell v. United States, 2009 WL 292926, *1 (D. Ariz. Sep. 10, 2009) (citing Boney v. Valline, 2009 WL 302053 (D. Nev. Jan. 22, 2009) (stating that tribal law officers enforcing tribal laws against other tribal members were not furthering federal interests)).

Likewise, the fact BIA agents instructed Massey to arrest Dupris and have Massey instruct Anderson to arrest Reed on tribal charges or that the investigation was conducted jointly by BIA agents and tribal officers neither establishes that Anderson and Massey were federal law enforcement officers subject to the proviso, nor does it make the arrests federal. To the contrary, as established, the fact Plaintiffs were arrested on tribal charges and prosecuted in tribal court clearly shows that *only* tribal law was being enforced. Id. Any contention that it is irrelevant that Plaintiffs were arrested and prosecuted under tribal law ignores the facts and completely disregards tribal sovereignty, which is separate and distinct from the United States' sovereignty. United States v. Male Juvenile, 280 F.3d 1008, 1020-21 (9th Cir. 2002) (an Indian tribe's power to prosecute a member derives from inherent sovereignty making a subsequent prosecution by the federal government permissible under the dual sovereignty double jeopardy doctrine). Sovereignty is not interchangeable. Id., at 1020 ("Indian tribes are not federal agencies, but rather derive

their power from their inherent and independent sovereignty."); see also Russell, 2009 WL 292926, *1.

Second, despite being part of the Task Force, there is no evidence that Anderson and Massey were certified or empowered to enforce federal law. In fact, they were not certified or empowered to enforce federal law and could not arrest anyone for a violation of federal law. CSOF ¶¶ 19-20. Similarly, Anderson and Massey were neither "deputized" by the BIA to enforce federal law, nor granted Special Law Enforcement Commissions (SLEC) to effectuate federal arrests or enforce federal law. Id. ¶ 21. Plaintiffs' blanket generalization that the BIA is "authorized to enter into deputation agreements with tribes to enforce federal laws," Doc. 170, p. 6 (citing Hopland Band of Pomo Indians v. Norton, 324 F. Supp. 2d 1067, 1072 (N.D. Cal. 2004)), carries no weight here because Anderson and Massey were in fact not deputized by the BIA and there is no evidence of a deputation agreement in this matter. The follow-on inference by Plaintiffs that Anderson and Massey were deputized because "such deputation is required for trial police to make 'warrantless arrests,' such as the arrests of Plaintiffs in this case at hand[,]" Doc. 170, p. 6, is blatantly incorrect and frankly disingenuous as there are no facts which support their deputation or authority to make arrests for federal offenses. Rather, Hopland provided "*[o]nce a deputation agreement is in place*, a tribal police officer, if found on a case-by-case basis to be qualified, *may be commissioned* by the BIA,..." 324 F. Supp. 2d at 1072 (emphasis added); see also Russell, 2009 WL 292926, *2 ("the BIA is authorized to delegate that responsibility to tribal police through a written contract and, once that contract is in place, through federal commissions called 'special law enforcement commissions' or 'SLECs' issued to individual tribal officers determined to be qualified on a case-by-case basis") (quoting Hopland, 324 F. Supp. 2d. at 1068). The facts clearly show that Anderson and Massey had no such federal deputation or special law enforcement commission by the BIA. CSOF ¶¶ 19-21. Under the circumstances, Plaintiffs' entire argument on federal deputation is nothing more than an unnecessary distraction, distorting the real issue.

Accordingly, Plaintiffs cannot demonstrate that Anderson and Massey were federal law enforcement officers for purposes of the proviso. This does not mean, as Plaintiffs claim without support, that Anderson and Massey are now the "veritable pariahs" of the Task Force. Doc. 170, n.1. It simply means Anderson and Massey served a different role on the Task Force; a tribal role unique to them which could not, by law, be accomplished by the Task Force's BIA agents. CSOF ¶¶ 8-11, 19-21. That was a consideration for why the tribal officers were made part of the Task Force in the first place. Id. This in no way challenges Anderson and Massey's federal employment status.

Plaintiffs' reliance on the BIA's "638 contract" with the Tribe does not change the result and, for purposes of whether Anderson and Massey are federal law enforcement officers, is a red herring. The mere fact a 638 contract is in place does not mean the tribal officers are certified to enforce federal law or that they are "law enforcement officers" for purposes of the FTCA (and covered by the proviso), thus precluding FTCA liability for intentional torts, unless they have been certified to enforce federal law as opposed to tribal law. Dry v. United States, 235 F.3d 1249 (10th Cir. 2000).

In the end Plaintiffs cannot escape the fact they were arrested, charged and prosecuted under tribal law. The final killing blow to Plaintiffs' intentional tort claims comes from this very Court in a statement which mirrors the current facts at issue and resolves the question once and for all: "Absent the power to enforce federal law, tribal officers are not federal investigators or law enforcement officers." Russell, 2009 WL 292926, *1 (quoting Trujillo v. United States, 313 F. Supp. 2d 1146 (D. N.M. 2003) (citing Dry, 235 F.3d at 1249)); Casillas v. United States, 2009 WL 735193, *14 (D. Ariz. Feb. 11, 2009) (same); see also Hebert v. United States, 438 F.3d 483 (5th Cir. 2006). Because Anderson and Massey did not enforce federal law and were not empowered by law to enforce federal law, they are not federal "law enforcement officers" for purposes of the proviso to § 2680(h)'s intentional tort exception. Accordingly, Plaintiffs' FTCA

claims based on their actions are barred and should be dismissed.[3]

CONCLUSION

For the foregoing reasons, the Federal Defendants respectfully request the Court deny Plaintiffs' Motion for Partial Summary Judgment regarding the federal employee status of the tribal officer defendants as moot. In the alternative, the Federal Defendants respectfully request the Court deny this motion and dismiss Plaintiffs' FTCA claims based on the fact Anderson and Massey are not covered by the proviso to the FTCA's intentional tort exception.

Dated: September 28, 2011

Respectfully submitted,

/s/James G. Bartolotto
JAMES G. BARTOLOTTO
KELLY HEIDRICH
Trial Attorneys
Torts Branch, Civil Division
United States Department of Justice
Attorneys for the Federal Defendants

[3] Furthermore, because federal law was not being enforced, CSOF ¶ 12-13, 17, 27, 29, the proviso does not apply even with regard to the BIA agents. Therefore, sovereign immunity for these intentional torts is not waived for *any* member of the Task Force and Plaintiffs' FTCA claims should be dismissed pursuant to 28 U.S.C. § 2680(h).

CERTIFICATE OF SERVICE

I hereby certify that on September 28, 2011, a true and correct copy of the foregoing **THE FEDERAL DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT WITH INCORPORATED MEMORANDUM IN SUPPORT** was filed with this Court electronically and served by mail on any party to this action unable to accept electronic filing. Notice of this filing will be sent by electronic mail (e-mail) to Plaintiffs' counsel and all parties by operation of the Court's electronic filing system (ECF) or by mail to any party unable to accept electronic filing. Parties may access this filing through the Court's CM/ECF System. This Response is filed electronically pursuant to LRCiv 5.5, and comports with LRCiv 7.1 and LRCiv 7.2.

/s/James G. Bartolotto
JAMES G. BARTOLOTTO
Trial Attorney